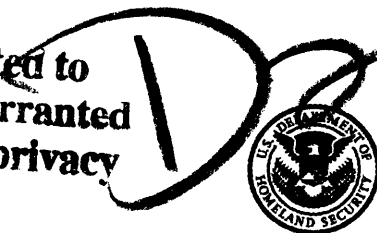


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U.S. Citizenship
and Immigration
Services

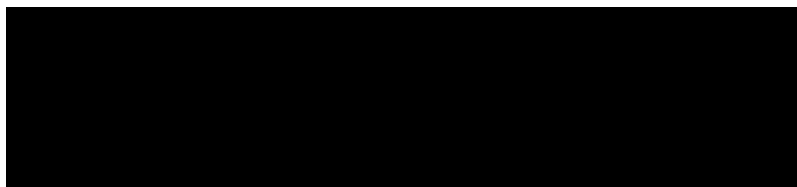


FILE: EAC 02 070 53202 Office: VERMONT SERVICE CENTER Date: APR 07 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

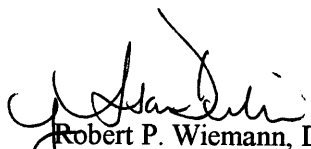
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a computer software consulting and development firm that seeks to employ the beneficiary as a programmer analyst. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

The director denied the petition on the following grounds: (1) the proffered position is not a specialty occupation; and (2) the beneficiary is not qualified to perform the duties of a specialty occupation. On appeal, counsel submits a brief.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a programmer analyst. Evidence of the beneficiary's duties includes: the Form I-129; the December 17, 2001 letter accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail, in part: designing, programming, and implementing customized software applications and packages; reviewing, repairing, and modifying software programs to ensure technically accurate and reliable programs; analyzing communications, information, database, and programming requirements; reviewing existing systems for compatibility with client needs; researching and selecting appropriate systems; training clients; and providing technical and de-bugging support. The petitioner implied that a qualified candidate for the job would possess a bachelor's degree in electronics engineering.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). Moreover, the director found that, based on the beneficiary's academic training and experience, he did not qualify to perform services in a specialty occupation.

On appeal, counsel contends that: (1) the petitioner has satisfied more than one of the criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A); and (2) the beneficiary is qualified to perform the duties of a specialty occupation. Upon review of the record, however, the AAO finds that the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

Counsel claims that the Immigration and Naturalization Service, now CIS, historically approved similar petitions in which a beneficiary possessed a bachelor's degree in electronics engineering, and counsel cites to an AAO decision to confirm that the AAO usually accepts an engineering degree for a computer job.

Counsel's claim is unpersuasive. This record of proceeding does not contain the supporting evidence submitted to the service centers in the prior cases. Thus, the AAO cannot determine whether those petitions are parallel to the instant position. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). As such, counsel's claim is unmeritorious.

The AAO turns first to the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria include: whether the Department of *Labor's Occupational Outlook Handbook* (the *Handbook*) reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

In deciding whether a position qualifies as a specialty occupation under the first criterion, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly

specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The 2002-2003 edition of the *Handbook* is instructive in determining whether a position requires a baccalaureate or higher degree or its equivalent for entry into the occupation.

The AAO does not agree with counsel that the proffered position is analogous to that of a programmer analyst. A careful study of the *Handbook* reveals that the duties of the proffered position reflect those performed by network or computer systems administrators. For example, their duties entail: designing, installing, and supporting an organization's LAN, WAN, network segment, Internet, or Intranet system; providing onsite administrative support for software users; maintaining network hardware and software, analyzing problems, and monitoring the network to ensure availability to system users; and gathering data to identify customer needs and then use that information to identify, interpret, and evaluate system and network requirements. This correlates with the duties of the proffered position as described in the December 17, 2001 letter. For example, the letter, in part, states that the beneficiary will plan and develop new computer systems to meet a specific client requirement, analyze hardware and software packages for the system, and modify hardware and software to make it compatible with the system. With respect to the educational requirements for network or computer systems administrators, the *Handbook* explains that many employers seek applicants with bachelor's degrees, though not necessarily in a computer-related field. Accordingly, the petitioner fails to establish the first criterion; namely, that a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry into the particular position .

To establish the second criterion - that a degree requirement is common to the industry in parallel positions among similar organizations - counsel relies upon advertisements and the *Handbook* to aver that the industry requires a bachelor's degree in engineering for the proffered position. The AAO, nevertheless, finds that counsel's reliance on the advertisements and *Handbook* is misplaced. With respect to the advertisements, neither the duties of the positions nor the companies seeking candidates are adequately described in the advertisements. Thus, it is impossible to determine the similarity of the advertised positions and organizations to that of the proffered position and the petitioning entity. Furthermore, as previously discussed, the *Handbook* relates that the duties of the proffered position resemble those performed by network or computer systems administrators, and furthermore, the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, in a specific specialty is not required for network or computer systems administrator positions.

The AAO now turns to 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. Counsel maintains that the petitioner had submitted information regarding its three employees who occupy programmer analyst positions and their educational backgrounds.

The AAO is not persuaded that the position is a specialty occupation simply because the petitioner claims that it normally requires a degree for the proffered position. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or

higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. As already related, the responsibilities and duties of the proffered position would not require a bachelor's degree in a specific specialty.

Another of counsel's claims is that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The petitioner's December 17, 2001 letter claims that the candidate must possess substantial theoretical knowledge in the field of computer science. The letter, moreover, states that the beneficiary will devise high quality computer systems and programs.

The AAO finds that the claims of counsel and the petitioner are not sufficient in establishing the fourth criterion. To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. In addition, the *Handbook* contradicts the petitioner's claim; it conveys that the beneficiary's duties parallel those performed by network or computer systems administrators - positions that do not require a bachelor's or higher degree in a specific specialty. Hence, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The director also found that the beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. However, as the AAO is dismissing the appeal because the job is not a specialty occupation, it will not discuss the beneficiary's qualifications.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.